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NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Respondent begins its brief by misleadingly representing:

> In its citations to the opinions and judgment below, the Petition for a Writ of Certiorari (pp. 2-3) neglects to include the order of the Court of Appeals of November 23, 1982, denying the plaintiff-appellee's petition for rehearing (Br. Op. 1).

The Petition reproduced this order

verbatim (Pet. 22-23).

2. Respondent argues:

> Bose's contention that appellate review of public-figure defamation actions is limited by the "clearly erroneous" rule of Fed. R. Civ. P. 52(a) deliberately ignores the long and unbroken line of Supreme Court decisions calling for independent appellate review in such cases (Br. Op. 24-25).

None of the cases cited by respondent mention Rule 52(a) (Br. Op. 25-27).

Respondent does not mention *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968) where the Court said:

> . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> . . .
>
> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he

> published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

Respondent also argues,

> The Court of Appeals properly recognized the District Court's finding of actual malice as nothing more than an inference based on the alleged falsity alone (App. X36). In so holding, the appeals court did not dispute any true credibility or demeanor finding of the District Court Judge (Br. Op. 33).

Judgment of the credibility of author Seligson as a witness was for the trial court in determining whether "the defendant in fact entertained serious doubts as to the truth of his publication." The District Court found:

> After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. . . .
>
> Based on the above finding that Seligson's testimony to the contrary is not credible, the

> Court further finds that at the time of the Article's publication Seligson knew that the words "individual instruments . . . tended to wander about the room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test (App. X142-43)."

It is this finding of fact of knowing falsity based on "the opportunity of the trial court to judge of the credibility of the witnesses," that we submit cannot be set aside unless clearly erroneous. Respondent's contention that the District Court made this finding "without the benefit of any evidence, objective or subjective, upon which constitutional malice could be based . . . [by inferring] malice solely from its finding of falsity (Br. Op. 14)" is without foundation. Seligson testified that he was one of the two "panelists" and acknowledged that the "panelists" did not hear instruments

through the Bose system that tended to wander about the room (Pet. 10-16. App. X99-107, X138-143). Respondent's president "felt that we [respondent] were, in his opinion, weakest in our arguments about the wandering instruments (Pet. 13, A487-88, A208-11)." And respondent "refused to disclose to Bose the names of the recordings on which the CU 'panelists' supposedly had heard the 'wandering instruments', so Bose was unable to refute the false claim by making demonstrations using the same recordings (Pet. 12, App. X194-95).

Respondent points to no case holding that the "clearly erroneous" rule can be disregarded in setting aside findings of fact when a constitutional right is asserted. Regardless of whether the Court follows the First Circuit rule rejecting or the Ninth Circuit rule accepting the

"clearly erroneous" rule in reviewing findings of fact when a constitutional right is involved, the importance of this Court selecting a uniform national rule and the general applicability of that rule to a wide number of cases can hardly be doubted. Resolution of the conflict is particularly appropriate in this case because it involves the constitutional rights of parties to a trial without jury to have questions of credibility of witnesses resolved by the trial judge who actually heard the witnesses testify and observed their demeanor (Pet. 34-35).

Respondent implies that an independent review of the entire record is incompatible with following the "clearly erroneous" rule (Br. Op. 23-32). But that review can be made without setting aside those findings of fact which are not clearly erroneous. The Ninth Circuit

Court of Appeals in *Cher v. Forum International*, 692 F.2d 634 (9th Cir. 1982) "examined the trier's findings with the extra care required in such cases" while still ruling that regardless of the appellate court's agreement "with the trier's finding of knowing falsity, or fall[ing] back a step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed. R. Civ. P. 52 against Forum International, Ltd." 692 F.2d at 640. Respondent falsely states, "Nowhere in that case did the Ninth Circuit hold that it was limited by Fed. R. Civ. P. 52(a) in its review of the First Amendment claim there in issue (Br. Op. 31)."

3. Respondent argues that the petition should be denied because numerous other issues not resolved by the appellate court require reversal of the district

court's decision (Br. Op. 36). But that has no bearing on whether the important issues actually resolved by the Court of Appeals justify review in this Court. The Court of Appeals ruled that it was "not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); . . . [but] must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof (App. X22-23)." This broad rule is not restricted to governing constitutional law under any specific article of or amendment to the Constitution. The conflict with decisions of this Court, the Ninth Circuit and other Courts of Appeals, the applicability of the "clearly erroneous" rule to many cases, the national importance of the questions

presented, the constitutional rights involved, and the other reasons presented in the Petition support a conclusion that the Petition should be granted, regardless of which party eventually prevails.

CONCLUSION

For the foregoing reasons and those advanced in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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